MALAYSIAN BIO-XCELL SDN BHD v. LEBAS TECHNOLOGIES SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEALS NO: W-02(IM)(C)-1532-07-2018 &
W-02(IM)(C)-1533-07-2018]
7 JANUARY 2020

ARBITRATION: *Award – Recognition of – Seeking to stay application to enforce award – Whether award yet to become binding on parties – Whether court has discretion to hear application to suspend recognition or enforcement order based on award not yet becoming final – Whether conditions for grant of stay made out – Whether terms of s. 39(1)(a)(vii) of Arbitration Act 2005 met*

CIVIL PROCEDURE: *Stay – Application for – Stay application to enforce arbitration award – Whether award yet to become binding on parties – Whether court has discretion to hear application to suspend recognition or enforcement order based on award not yet becoming final – Whether conditions for grant of stay made out – Whether terms of s. 39(1)(a)(vii) of Arbitration Act 2005 met*

The appellant had a build, lease and transfer agreement with Metabolic Explorer Sdn Bhd (MetEx) to design, build, equip, test and commission a biotechnology facility for the production of propanediol (PDO) on a piece of land located in the appellant's biotechnology park ('principal agreement'). The appellant subcontracted the engineering, procurement, construction and commissioning works to the respondent *vide* contract ('EPCC contract'), which included the procurement of specific equipment for the appellant in relation to that principal agreement, two of which were related to the present appeal ('the said equipment'). The EPCC contract was terminated by the appellant. That termination was challenged with the respondent seeking damages for breach of contract. The dispute was resolved in arbitral proceedings between the parties ('first arbitration proceedings.') A final award rendered in the first arbitration proceedings found the termination to be unlawful and the appellant was ordered to pay the respondent the sum of RM6,559,440.37 together with interests and costs. The appellant sued the respondent *vide* a civil suit at the High Court at Kuala Lumpur ('Suit 87') claiming delivery of the ownership of the said equipment. The respondent filed an application for a stay of Suit 87 pursuant to s. 10 of the Arbitration Act 2005 ('Arbitration Act'), which was allowed. Following the decision of the High Court on the stay of Suit 87, the appellant issued a notice to arbitrate. The second arbitration had since commenced with a differently composed panel of arbitrators. In this second arbitration, the appellant's

A claim against the respondent was for delivery and/or transfer of ownership rights of the said equipment upon payment of the judgment sum. In the intervening period, the respondent filed an application pursuant to s. 38 for recognition of the final award. In response, the appellant filed an application *vide* encl. 9 seeking the following principal orders (i) that the respondents' B application for recognition be stayed pending the hearing and disposal of the intended arbitration between the parties as ordered by the High Court; (ii) further, and/or in the alternative, that the enforcement of the final award be suspended pending hearing and disposal of the intended arbitration between the parties as ordered by the High Court. The respondent's C application for recognition was allowed while the appellant's application in encl. 9 was dismissed. In essence, the appellant's application was dismissed primarily because there was no power or jurisdiction to grant the orders sought, and that the courts could not call on its inherent jurisdiction to grant the order of stay or suspension. Hence, this appeal by the appellant against the said decisions.

D

Held (allowing appeals with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) Section 39(1)(a)(vii) read with s. 39(2) of the Arbitration Act confers discretion on the court hearing an application to suspend the recognition E or enforcement order based on the award not yet becoming final to, in proper cases, adjourn its decision on the application for recognition or enforcement; or may even order the appellant to provide security. How that discretion is to be exercised and what circumstances, conditions or situation may be said to be 'proper' for the exercise of discretion of F suspension is a matter of judicial evaluation and scrutiny having regard to all the facts and circumstances presented. The burden of proof is on the appellant to show on a balance of probabilities that the ground is satisfied. (para 28)

(2) The appellant had rightly invoked s. 39 of the Arbitration Act and G resisted the respondent's application for recognition under s. 39(1)(a)(vii). The appellant could not have invoked the active remedies contained in s. 37 as it accepted that the award was binding (s. 36); just that for the reasons relied on, the award had yet to become binding. This unique ground is only available under s. 39(1)(a)(vii) and H is not mirrored in s. 37. Contrary to the Judicial Commissioner's ('JC) understanding of s. 39(1)(a)(vii) and thereby the operation of art. V of the New York Convention and art. 36 of Model Law, a refusal of recognition or enforcement is not necessarily dependent on the existence of an application to set aside the arbitration award. It is precisely where

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it is proved by the opposing or resisting party, such as the appellant, that the award is yet to become binding, that the recognition or enforcement is refused, stayed or even adjourned. Where s. 39(1)(a)(vii) is invoked, the court is obliged to examine the basis relied on. Had His Lordship undertaken that exercise, he would have found that the terms of s. 39(1)(a)(vii) had been met. (paras 48-50 & 52)

(3) In the face of such defined dispute between the parties, and while it may be true that the appellant was seeking some form of security, the fact remained that a case had been made to support the contention that the award was yet to become binding; that the recognition ought to be stayed pending the hearing and disposal of the second arbitration. What should not be overlooked was that it was the respondent who approached the court to refer the appellant's dispute to arbitration and further agreed to certain consensual terms which relate the award with the ownership and delivery of the equipment and thereby the first arbitration to the second arbitration; which terms and circumstances were relied on and upon which the parties, especially the appellant, had acted. Those consensual terms were binding on the parties, thus there was some basis for the argument of estoppel as submitted by the appellant. However, how the award and the ownership of the equipment would finally be determined was precisely one of the questions to be determined in the second arbitration, and for such reason, the award was not yet binding within the meaning of s. 39(1)(a)(vii). (para 59)

(4) Having regard to the circumstances and reasons relied on by the appellant, this court was amply satisfied that the conditions for a grant of a stay would have been and were made out. There were merits in the appeals. The JC was plainly wrong and in error in dismissing the appellant's application in encl. 9. The appellant's application ought to have been allowed as the appellant had proven his case under s. 39(1)(a)(vii) of the Arbitration Act. (paras 60 & 61)

Case(s) referred to:

Antilles Cement Corporation (Puerto Rico) v. Transficent (Spain) [2006] XXXLYBCA 846 ***(refd)***

CTI Group Inc v. International Bulk Carriers SPA [2017] 9 CLJ 499 FC ***(refd)***

Dalimpex Ltd v. Janicki et al; Agros Trading Spolka ZOO v. Dalimpex Ltd [2003] OJ No. 2094 ***(refd)***

Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755 ***(refd)***

Dardana v. Yukos [2002] EWCA Civ 543 ***(refd)***

Diag Human Se v. Czech Republic [2014] EWHC 1639 (Comm) ***(refd)***

Dowans Holdings SA and Another v. Tanzania Electric Supply Co Ltd [2011] 141 ConLr 176 ***(refd)***

Europcar Italia v. Maiellan Tours Inc [1998] USCA2 379 ***(refd)***

A *FR Absalom Ltd v. Great Western (London) Garden Village Society [1933] AC 592* ***(refd)***
Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co KG (Germany); Toralf Mueller (Intervener) [2019] 10 CLJ 281 CA ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Owens Bank v. Bracco [1992] 2 AC 443 ***(refd)***
B *Popack v. Lipszyc [2018] OJ No. 3716* ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Ors [2013] 1 LNS 1323 HC ***(refd)***
Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal [1971] 1 LNS 143 FC ***(refd)***

Legislation referred to:
C Arbitration Act 2005, ss. 8, 10, 36, 38, 39(1)(a)(vii), (2)

Arbitration Act 1996 [UK], ss. 101, 103(2)(f)
International Commercial Arbitration Act [Canada], Schedule arts. 8, 86(2)

Other source(s) referred to:
Dicey, Morris & Collins, *The Conflict of Laws,* 15th edn, para 14-22

D *For the appellant - Gavin Jayapal, Tan Koon Heo & Tan Joes Nan; M/s Gavin Jayapal*
For the respondent - Sivabalan Sankaran, Tharmini Paramasivan & Kristie Chew; M/s Tan Swee Im, Siva & Partners

[Editor's note: For the High Court judgment, please see Lebas Technologies Sdn Bhd v. Malaysian Bio-Xcell Sdn Bhd [2018] 9 CLJ 533 (overruled).]

E *Reported by Suhainah Wahiduddin*

JUDGMENT

Mary Lim JCA:

F **[1]** By encl. 9 in the court below, the appellant sought to stay the respondent's application for enforcement of a final award rendered at arbitration proceedings concluded between the parties; or alternatively, to suspend the enforcement of that award, pending disposal of an intended arbitration between the parties. The application was dismissed. At the same time, the respondent's application for recognition and/or enforcement of the final award (encl. 1) was allowed. On appeal against both decisions which appeals were heard together, we unanimously reversed those decisions and our reasons are set out below.

H **[2]** The underlying facts are found in the decision of the learned Judicial Commissioner (as he then was) (JC), and we adopt the same to be set out here for ease of reference.

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Background Facts

[3] The appellant had a build, lease and transfer agreement dated 1 November 2010 with Metabolic Explorer Sdn Bhd (MetEx) to design, build, equip, test and commission a biotechnology facility for the production of propanediol (PDO) on a piece of land located in the appellant's biotechnology park in Johor Bahru (principal agreement). The appellant subcontracted the engineering, procurement, construction and commissioning works to the respondent *vide* contract dated 21 June 2011 (EPCC contract). That EPCC contract included the procurement of specific equipment for the appellant in relation to that principal agreement, two of which are related to the present appeal and collectively referred to as "the said equipment", namely:

i. Salt Removal Process by Buss SMS CANSLER Gmbh; and

ii. Water Removal Process by GEA WIEGAND Gmbh.

[4] The EPCC contract was terminated by the appellant on 15 March 2013. That termination was challenged with the respondent seeking damages for breach of contract. The dispute was resolved in arbitral proceedings between the parties. This is referred to as the "first arbitration proceedings".

[5] On 2 February 2015, a final award rendered in the first arbitration proceedings found the termination to be unlawful and the appellant was ordered to pay the respondent the sum of RM6,559,440.37 together with interest and costs. That sum was made up of the balance sum due under the final account and the value of the performance bond which was wrongly called.

[6] When the appellant failed to comply with the final award, the respondent filed on 27 April 2017 an application pursuant to s. 38 of the Arbitration Act 2005 (Act 646) to recognise the final award as a judgment. The application was, however, withdrawn by consent on 28 July 2017 when the appellant objected to the language used in the application.

[7] On 8 August 2017, the appellant sued the respondent *vide* a civil suit filed at the High Court at Kuala Lumpur (Suit 87) claiming delivery of the ownership of the said equipment. The respondent filed an application for stay of Suit 87 pursuant to s. 10 of Act 646. This application for stay was allowed on 15 November 2017 by the learned judge hearing Suit 87. Further, by consent, it was ordered that:

(i) the appellant was to issue a notice to arbitrate within one month;

(ii) the arbitration proceedings were to be heard before the same arbitrators who delivered the final award dated 2 February 2015, if possible;

(iii) if any arbitrator was indisposed, the procedure for appointing a new arbitrator would be commenced in accordance with the arbitration agreement.

[8] Following the above decision of the High Court on the stay of Suit 87, the appellant issued a notice to arbitrate on 13 December 2017.

[9] We understand the second arbitration has since commenced on 21 December 2017 with a differently composed panel of arbitrators. In this second arbitration, the appellant's claim against the respondent is for delivery and/or transfer of ownership rights of the "said equipment" upon payment of the "judgment sum". The said equipment refers to the same Salt Removal Process by Buss SMS CANSLER Gmbh and the Water Removal Process by GEA WIEGAND Gmbh mentioned in the first arbitration proceedings whilst the judgment sum refers to the sum determined in the final award.

[10] In the intervening period, on 20 September 2017, the respondent filed a second application pursuant to s. 38 for recognition of the final award. In response, the appellant filed an application *vide* encl. 9 seeking the following principal orders:

(i) that the respondent's second application for recognition be stayed pending the hearing and disposal of the intended arbitration between the parties as ordered by the High Court on 15 November 2017;

(ii) further and/or in the alternative, that the enforcement of the final award be suspended pending hearing and disposal of the intended arbitration between the parties as ordered by the High Court on 15 November 2017.

[11] On 25 June 2018, the respondent's second application for recognition was allowed while the appellant's application in encl. 9 was dismissed. At the time this decision was made, the second arbitration was already underway. It is the decisions made on 25 June 2018 which form the subject matter in these appeals before us.

Decision Of The High Court

[12] After examining s. 39 of Act 646, the High Court dismissed the application for a multitude of reasons. The court found the appellant's application for a stay of the application to enforce or a suspension of the enforcement of the final award was outside the terms of s. 39. While s. 39 permits a refusal to recognise or enforce an arbitration award, it does not provide for a stay of an application to enforce or a suspension of the enforcement of an arbitration award. Put in simple terms, the orders sought "are therefore not within the provisions of s. 39 of the Arbitration Act."

[13] Because the appellant had invoked s. 39(1)(a)(vii), the High Court proceeded to nevertheless consider the application under that provision. Having done so, the High Court found that there was "no legitimate basis upon which it may be contended that the award has not yet become binding on the parties". The learned JC held that it was:

> … a fallacy to suppose that merely because the issues in dispute in the 2nd Arbitration are somehow connected to those in the 1st Arbitration, and thus the Award, *ergo* the Award has not yet become binding on the parties. This is a *non sequitur*.
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> [30] While the dispute in the 1st Arbitration and the dispute in the 2nd Arbitration may stem from the same EPCC Contract, they are nonetheless discrete and distinct disputes. This would be so even if in the 2nd Arbitration, findings of fact or issues raised in the first arbitration are to be relied upon. The first arbitration was concerned with payment. The 2nd Arbitration is concerned with the equipment.
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> [31] From the Notice to Arbitrate, there appears to be an attempt to link the issues in dispute in the 2nd Arbitration to the 1st Arbitration. Yet, this does not make the award dependent or conditional upon the outcome of the 2nd Arbitration. Whatever the outcome of the 2nd Arbitration, the award will remain as it is. Particularly, since there is no application to either set aside or suspend the Award itself.

[14] For the same reasons, the learned JC rejected the suggestion that the respondent had approbated and reprobated merely because it had agreed that the dispute over the equipment should be the subject matter of an arbitration, opining that merely because the disputes stem from the same EPCC contract, "the two disputes are different in substance. One concerns the right to payment while the other, the right in and to be provided the equipment." For the same reasons too, the learned JC rejected the argument that "allowing the enforcement of the award would somehow contradict the order given by the court to stay Suit 87 pending the second arbitration."

[15] The appellant had also invoked the principle of estoppel, contending that there was agreement or promise by the respondent to secure the equipment for the appellant. Again, this was rejected by the learned JC after examining the letter in question, that it was an offer of assistance made specifically without prejudice to the respondent's rights under the award, that in any case, there was nothing to suggest that the award was made because reliance was placed on some representation by the respondent. Other considerations that weighed with the learned JC were that it was the appellant's own fault that it did not receive the equipment; that there was no unjust enrichment; that the court's inherent powers to stay should not be grafted on to matters that legitimately fall within the ambit of the Act as nothing in the Act admit of a stay of enforcement predicated upon special circumstances that would normally afford a stay of execution in respect of a judgment of a court.

[16] According to the learned JC, the application in encl. 9 was not for a stay in its true sense as there was no pending appeal against the award; hence there was no risk of the outcome of any appeal being rendered nugatory should the award be enforced. Since there was no application to set aside the award, there was no reason why enforcement of the award should be stayed.

[17] The learned JC also took on board the appellant's submissions which were described as "Contentions beyond the Arbitration Act"; and having examined them, similarly dismissed the same. The learned JC opined that by virtue of s. 8, the Arbitration Act "has the flavor of being an exclusionary legislation", thus leaving "very little avenue for the courts to intervene". Since there are specific grounds in s. 39 as to when recognition or enforcement may be refused, the court has "no room … to admit of other grounds not provided." Ultimately, the learned JC concluded that what the appellant was "truly seeking in this case is to be secured. It wants to be certain that when it pays the plaintiff under the award, it will receive the equipment that it intended to secure under the EPCC contract. However, what the defendant seeks is not within the purview of s. 39 of the Arbitration Act. Indeed if the issues in dispute in the second arbitration could have been, or was, addressed and resolved in the first arbitration, the problem presented in this case would not have arisen."

[18] The learned JC further relied on s. 36 to find the appellant's arguments unpersuasive. Section 36 provides that awards rendered by an arbitral tribunal are final and binding on the parties.

Our Decision

[19] In essence, the appellant's application was dismissed primarily because there was no power or jurisdiction to grant the orders sought, that the courts cannot call on its inherent jurisdiction to grant the order of stay or suspension. The learned JC further found the grounds in any event, not made out.

[20] With respect, we disagree finding the learned JC to have misapprehended the law and thus in the application of the principles to the prevailing facts and circumstances.

[21] These are the terms of s. 39:

> **Grounds for refusing recognition or enforcement**
>
> 39. (1) Recognition or enforcement of an award, irrespective of the State in which it is made, **may be refused only at the request of the party against whom it is invoked**:
>
> (a) **where that party provides to the High Court proof that:**
>
> (i) …
>
> (ii) …

(iii) …

(iv) …

(v) …

(vi) …

(vii) **the award has not yet become binding on the parties** or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

(emphasis added)

[22] The appellant's application in encl. 9, the subject matter of the first appeal, was premised on this particular provision. Section 39 is not only taken from article 36 of the UNCITRAL Model Law on International Commercial Arbitration, it is also the embodiment of article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, known by its moniker "the New York Convention." Section 39 in fact mirrors much of what may be found under the New York Convention and Model Law, save for differences in drafting.

[23] Although the grounds for refusing recognition or enforcement of awards under s. 39 are substantially similar to the grounds for setting aside an award under s. 37, there is an important distinction that must be borne in mind. The setting aside mechanism under s. 37 may only be undertaken in the jurisdiction where the award was rendered whereas the application for recognition and enforcement may be made before any court where the successful party intends to enforce that award; and that generally is where either the assets or where the unsuccessful party may be located. Generally and logically, it is usually the former. This distinction is not material in the present appeals as the appeals arose from a domestic arbitration.

[24] A more material respect how and where s. 39 differs from s. 37 is precisely on the ground relied on by the appellant, that recognition and enforcement of an award may be refused under s. 39(1)(a)(vii) only at the request of the party against whom such an order is sought, and that is where the award is alleged to have not yet become binding on the parties. This ground is not available under s. 37 but is peculiar to challenges under the New York Convention. The burden is on the party seeking to rely on such a ground, that is, the appellant – see *Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co KG (Germany); Toralf Mueller (Intervener)* [2019] 10 CLJ 281 CA.

[25] In essence, the appellant's claim that the award has not yet become binding is by reason of the second arbitration that was ordered by the High Court on 15 November 2017 with the parties agreeing further on certain specific terms. It must be stressed that the appellant is not saying that the

award is not binding, it recognises that awards rendered post arbitration are binding, be it as provided under the arbitration agreement or under s. 36. What the appellant however asserts is that because of the particular facts, circumstances and explanation as offered by the appellant, the award in question has not yet become binding within the meaning of s. 39(1)(a)(vii); or put it the other way round, that the award has yet to become binding. And, until those facts or circumstances are overcome or spent, the award remains yet to be binding on the parties.

[26] There are no local decisions on the meaning and approach to be taken in construing s. 39(1)(a)(vii), how the term "not yet binding" is to be construed. There is however, guidance especially from jurisdictions which are member States of the New York Convention, Model Law and from the experts in this field. Such guidance is highly persuasive and of much assistance given the importance and acknowledged role that arbitration plays in dispute resolution quite aside from the need for consistency and uniformity in how arbitration awards are received in member States. We have frequently turned to other like-minded jurisdictions in respect of other provisions of the Model Law and we see no reason why the same may not be adopted with regard s. 39(1)(a)(vii).

[27] But, before we consider those aspects, we find that learned JC had overlooked the terms of s. 39(2) as set out above. In our respectful opinion, s. 39(2) cloaks the court with specific discretion as to whether to suspend the award when moved under s. 39(1)(a)(vii):

> (2) If an application for setting aside or suspension of an award has been made to the High Court *on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.* (emphasis added)

[28] Section 39(2) specifically uses the term "suspension" of an award and that the application is made under s. 39(1)(a)(vii). This provision puts paid to the view and conclusion of the learned JC that there is no power to adjourn or to make the orders sought by the appellant. Section 39(1)(a)(vii) read with s. 39(2) confers discretion on the court hearing an application to suspend the recognition or enforcement order based on the award not yet becoming final to, in proper cases, adjourn its decision on the application for recognition or enforcement; or may even order the appellant to provide security. How that discretion is to be exercised and what circumstances, conditions or situation may be said to be "proper" for the exercise of discretion of suspension is, in our mind, a matter of judicial evaluation and scrutiny having regard to all the facts and circumstances presented. The burden of proof is on the appellant to show on a balance of probabilities that the ground is satisfied.

In other words, the appellant can only approach the court to object within any of the grounds in s. 39(1), it cannot rely on any other grounds – see *The Government of India v. Cairn Energy India Pty Ltd & Ors* [2013] 1 LNS 1323; [2014] 9 MLJ 149. This view and approach is supported by both learned authors and case law from like-minded New York Convention jurisdictions.

[29] First, the jurists. Learned authors Redfern and Hunter on *International Arbitration* [6th edn Oxford University Press] had opined that "… some national courts still consider it necessary to investigate the law applicable to the award to see if it is 'binding' under that law – although the better position appears to be that an award is 'binding' if it is no longer open to an appeal on the merits, either internally (that is, within the relevant rules of arbitration) or by an application to the court." The same authors cited the decision of *Antilles Cement Corporation (Puerto Rico) v. Transficent (Spain)* [2006] XXXLYBCA 846 where the Supreme Court of Spain had held that whether an award is yet to become binding "is not to be examined in accordance with the law of the State where the award is rendered." However, if an appeal is pending, the enforcement court may, if it considers it proper, adjourn the decision on enforcement; and may also order the party against whom enforcement is sought to give security; as provided under article VI of the New York Convention.

[30] Next, the case law. These cases reveal a studious effort by the court to discern the meaning to be ascribed with some jurisdictions drawing a distinction between resorts to "ordinary recourse" as opposed to "extraordinary recourse"; that an award becomes binding when a party has exhausted avenues of ordinary recourse.

[31] The respondent has cited to us the decision of *Europcar Italia v. Maiellan Tours Inc* [1998] USCA2 379 where the Court of Appeals, Second Circuit opined that:

> … a district court faced with a decision whether to adjourn arbitral enforcement proceedings to await the outcome of foreign proceedings must take into account the inherent tension between competing concerns. On the one hand, the adjournment of enforcement proceedings impedes the goals of arbitration – the expeditious resolution of disputes and the avoidance of protracted and expensive litigation. Under the law of many countries, an arbitration award is final, binding and enforceable even if subject to further appeal in court. See *Fertilizer Corp*, 517 F Supp ... A stay of confirmation should not be lightly granted lest it encourage abusive tactics by the party that lost in arbitration …
>
> On the other hand, certain considerations favor granting a stay. One of the grounds for refusing to enforce an award under Article V(1)(e) is if the award "has been set aside or suspended by a competent authority of the country in which … the award was made." Thus, where a parallel proceedings is ongoing in the originating country and there is a possibility

> that the award will be set aside, a district court may be acting improvidently by enforcing an award prior to the completion of the foreign proceedings. Moreover, where, as here, it is the plaintiff who first sought to enforce his award in the originating country, the argument for enforcement by the plaintiff in the district court loses force because the possibility of conflicting results and the consequent offence to international comity can be laid at the plaintiff's door ...

[32] A similar approach is adopted by the English and Canadian Courts. The cases from these jurisdictions reveal similarly a pro-enforcement approach but nevertheless does not detract from the requirement that where recognition and enforcement is resisted or mounted on the ground that the award is yet to become binding, the circumstances and reasons relied on for such challenge must be carefully examined. Where valid and cogent reasons are proven, the court will exercise discretion to grant either an adjournment for the recognition or if granted, a stay of execution of the order of recognition. Such orders do not mean that the jurisdiction is less arbitration friendly or supportive, that the courts are perceived to be intervening beyond its prescribed jurisdiction.

[33] In *Dowans Holdings SA and Another v. Tanzania Electric Supply Co Ltd* [2011] 141 ConLr 176, [2011] EWHC 1957, the issue was whether the fact that there were pending petitions to set aside an ICC award in the home jurisdiction of Tanzania meant that the award was not yet binding within the meaning of s. 103(2)(f) of the English Arbitration Act 1996. The court held that the question is to be determined by:

> [24] … deciding whether the United Kingdom court is in a position to recognise and enforce a convention award, and not by way of assessment of whether the Tanzanian court would consider that it is binding. In any event, I conclude, not least because there is, as I have set out, no authority of the Indian Supreme Court which would be more binding upon, or persuasive to, the Tanzanian Court than to the English Court, that the answer would be, and should be, the same in both Courts. I am entirely persuaded, not only by the clear reminder by Steyn J in *Rosseel NV v. Oriental Commercial and Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 as to the effect of the New York Convention, but by the predominant international view.

[34] However, Burton J cautioned that if he had reached the contrary conclusion that, by virtue of the existence of the petition(s) in Tanzania, the ICC award is not yet binding, he would in any event have had a discretion to exercise under s. 103(2). It is not a question of an automatic refusal of recognition or enforcement simply because one of the subsections of s. 103(2) is satisfied. Relying on *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 (Court of Appeal), and [2010] 2 WLR 805 (Supreme Court); Burton J held that "even if an award has been set aside in the home jurisdiction upon one or other of

the grounds set out in the subsections, the English Courts still retain a discretion to enforce the award, though that jurisdiction will be exercised sparingly." How that discretion would be exercised would depend on the old *Absalom* exception (see *FR Absalom Ltd v. Great Western (London) Garden Village Society* [1933] AC 592), that is, whether there was a general reference of a dispute to arbitration or a specific reference of a point or points of law.

[35] After examining the issue before the home jurisdiction, Burton J found the prospects of setting aside the award not fanciful but real. However, those prospects are such that if security is otherwise appropriate, he would justify an adjournment coupled with an order for security, and His Lordship ordered the payment of $US5 million as a condition for the grant of an adjournment.

[36] Subsequently, in *Diag Human Se v. Czech Republic* [2014] EWHC 1639 (Comm), Eder J examined s. 103(2)(f) of the Arbitration Act 1996 and on its facts, also concluded that the award in question was not yet binding. His Lordship took *inter alia* the view that pro-enforcement bias in respect of the New York Convention was recognised in England; that an award creditor seeking to enforce a Convention award in the England under s. 101 "has a *prima facie* right to recognition and enforcement" – see *Dardana v. Yukos* [2002] EWCA Civ 543. His Lordship further held that the grounds for refusing enforcement are exhaustive, restricted and construed narrowly, that enforcement may be refused only if one of the listed grounds is met. In other words, "enforcement is mandatory in all but the cases specified in the legislation and the list of defences is exhaustive". Further, the burden of proving any of those grounds is on the party resisting enforcement, and it is for the enforcing court to determine whether an award is binding or otherwise.

[37] However, in *Diag Human Se*, there were attempts to enforce the arbitration award in several jurisdictions including France, Luxembourg, the USA and Austria. The efforts in France and Austria failed whilst those in the USA and Luxembourg were still ongoing. In determining the question of whether the award thus was yet to be binding, the court held that since a foreign court had held that an award is not binding, there was no reason in principle "why that decision should not give rise to an issue estoppel between the parties provided of course, that the other conditions referred to above apply. In particular, provided that the issue is the same and that the decision can properly be said to be "on the merits", it does not seem, to me that the fact that such decision was made in the context of enforcement proceedings as opposed to any other type of proceedings can, of itself, be material. Indeed that is consistent with the view expressed in the leading textbook Dicey, Morris & Collins, *The Conflict of Laws*, 15th edn. para 14-22 referring to *Owens Bank v. Bracco* [1992] 2 AC 443 … It also seems implicit in the decision of the Court of Appeal in *Yukos Capital v. Rosneft* …" The court further refused a partial enforcement order.

[38] Then there are the decisions of the Canadian Courts.

[39] In *Popack v. Lipszyc* [2018] OJ No. 3716, the Ontario Court of Appeal allowed an appeal and proceeded to recognise and enforce an arbitration award. The first instance court had granted a stay and had refused recognition on the basis that the award had not yet become binding because the parties were asking the arbitral tribunal for an interpretation of the currency under which the award was denominated and also to decide on post-award cost issues; because the award was ambiguous and the tribunal had not declared the arbitration proceedings as terminated. The Ontario Court of Appeal rejected all those grounds, citing "pro-enforcement" legal regime for the recognition and enforcement of international commercial arbitration awards; favouring the general rule of construing the grounds for refusal of enforcement "narrowly"; that by the terms of the arbitration agreement, the award "was not open for appeal neither in any religious court nor in any secular court". The court further accepted the appellant's argument that it was "a request to adjudicate a new issue", and that "the respondent's stated intention to seek costs relating to the setting aside and enforcement proceedings" certainly does not constitute a computational, clerical or typographical error in the award, nor a request to make an 'Additional award' as to "claims presented in the arbitral proceedings but omitted from the award".

[40] However, in an earlier decision in *Dalimpex Ltd v. Janicki et al; Agros Trading Spolka Z.O.O. v Dalimpex Ltd* [2003] OJ No. 2094, the Court of Appeal of Ontario affirmed the decision of the Divisional Court staying action pending final arbitration by the Court of Arbitration in Poland of all disputes between the parties; and allowing an appeal on a grant of provisional judgment recognising an award by the Court of Arbitration in Poland obtained by Agros against Dalimpex as a valid and enforceable judgment in Ontario. The facts there were these.

[41] Dalimpex and Agros had an amended agency agreement giving Dalimpex the right to sell Agros' products in Canada on commission. Under the agreement, Agros could still trade directly in the same goods in Canada but Dalimpex will receive reduced commission for such direct sales, while Dalimpex could also purchase goods directly from Agros and trade on its own behalf with its own customers. Dalimpex was however required to keep Agros fully informed about of all of its activities and to "keep business secret" both within the duration of the agreement and after its expiration. The agreement, drafted in English provided that only Polish Law applied to it. It contacted an arbitration clause wherein any disputes arising in connection with interpretation or execution of the agreement would be settled by the College of Arbitrators/Arbitration Court/at the Polish Chamber of Foreign Trade in Warsaw, decision of which would be final and binding, and the competence of state courts was absolutely excluded.

[42] Following legislative changes, the Polish Chamber of Foreign Trade ceased to exist; a new body, National Chamber of Commerce took over. This new body created a Court of Arbitration. Disputes arose between the parties, Dalimpex filed an action in court whereas Agros instituted arbitration proceedings in the Court of Arbitration, Poland. Dalimpex defended the claim for lack of jurisdiction only in that the bank guarantee which was at the heart of the dispute fell outside the scope of the arbitration clause. This was rejected by a majority decision of the Court of Arbitration which went on to grant an award for Agros. Dalimpex applied to set aside the award relying on the same jurisdictional argument. This application was dismissed and Dalimpex appealed. That appeal remained outstanding before the Polish courts.

[43] Agros then filed for a stay of Dalimpex' court action and for an order requiring Dalimpex to refer the dispute to arbitration. The application was dismissed on the ground that the arbitrator named in the arbitration clause had ceased to exist and because the tort claims fell outside the scope of the arbitration agreement. On appeal to the Divisional Court, that decision was set aside and an order staying the action pending final resolution by arbitration of all disputes by the Court of Arbitration of the Polish Chamber of Commerce in Warsaw was also granted. The Divisional Court held by majority, that where an arbitration clause is capable of bearing two interpretations, one of which provides for arbitration, the courts should lean towards that option. The minority judge concluded otherwise, taking the view that it was arbitration before the College of Arbitrators and no other, and so when that body ceased to exist, there could be no arbitration. Meanwhile, Agros filed an application for recognition and enforcement of the award. Keenan J granted a "provisional judgment" recognising the award made by the Court of Arbitration, Poland as valid and enforceable in Ontario.

[44] Both parties appealed; Dalimpex contending that the award should not be enforced because the Court of Arbitration in Poland was not the parties' chosen arbitrator and because that court did not have jurisdiction over the dispute in question; and Agros cross-appealing on the basis that the judgment should not have been provisional but final and then stayed pending any appeal from the award in the Polish courts. Dalimpex was prepared to agree with Agros on this aspect.

[45] The Ontario Court of Appeal distinguished the consideration of the question of the jurisdiction of the arbitral tribunal in a stay application under art. 8 (equivalent to our s. 10) where such an issue is left to be determined by the arbitral tribunal itself, particularly where it is unclear, and the court's

role was to mandatorily refer the dispute to arbitration, an approach similarly adopted by the courts in this country; and the situation under art. 36 (equivalent to our s. 39). After analysing the evidence presented and the submissions made, the Court of Appeal interpreted the arbitration clause as one which could reasonably include the new Court of Arbitration. However, it was preferable that such a jurisdictional issue be decided in the first instance by the arbitral tribunal itself, or finally by the Polish courts. As such, the Court of Appeal held that the application for recognition and enforcement ought to have been adjourned under art. 36(2) since in the event the award was set aside, the basis for the application would have disappeared; and if the appeal was dismissed, the application can be brought back before a justice of the Superior Court of Justice to be dealt with on the merits of this outstanding issue.

[46] The above decisions deal with the situation where the awards were in some way or another under challenge, especially before a different jurisdiction. This approach is to be adopted even where that is not the position. Where parallel proceedings are undertaken in the same jurisdiction, as cautioned in *Europcar Italia v. Maiellan Tours Inc* (*supra*) "and there is a possibility that the award will be set aside, a district court may be acting improvidently by enforcing an award prior to the completion of the foreign proceedings." In either case, it is clear that the construction and interpretation given to article V of the New York Convention and article 36 of the Model Law and thereby to s. 39(1)(a)(vii) is that there is power and jurisdiction to entertain a stay or even an adjournment of the application for recognition or enforcement where the resisting parties prove that the award is yet to become binding; that the court is not necessarily confined to refusing or granting the application for recognition or enforcement of the award.

[47] We agree with and adopt that consistent approach. However, we do not see a need to lay down any hard and fast definition to the term "yet to become binding", or to draw a distinction between "ordinary recourse" (denoting a genuine appeal on the merits of the award to a second review arbitral tribunal or a court) and "extraordinary recourse" (encompasses what the Convention and Model Law describe as set aside proceedings); suffice to say that the circumstances and reasons for making such a claim need must be carefully scrutinised in the exercise of the discretion under s. 39(1)(a)(vii).

[48] This approach is in no way contrary to that taken in *CTI Group Inc v. International Bulk Carriers SPA* [2017] 9 CLJ 499 where the respondent filed an application under s. 38 of the Arbitration Act 2005 to set aside the recognition and enforcement order granted under the same provision. The application was dismissed by the High Court but the decision was overturned on appeal. In allowing the appeal and in setting aside the decision of the Court of Appeal, the Federal Court held that s. 38 does not provide any

mechanism for setting aside an order of recognition and enforcement; that such an application must be made under s. 39. We are of the unanimous view that the appellant in the instant appeals has rightly invoked s. 39 and resisted the respondent's application for recognition under s. 39(1)(a)(vii). The appellant could not have invoked the active remedies contained in s. 37 as it accepts that the award is binding (s. 36); just that for the reasons relied on, the award has yet to become binding. This unique ground is only available under s. 39(1)(a)(vii) and is not mirrored in s. 37.

[49] The learned JC took the view that the order of stay or suspension of the enforcement sought by the appellant was not within the provisions of s. 39; that since the appellant had not made any application to set aside the award itself, the appellant's application was misplaced. Having seen the approach and construction given by the courts of Model Law and New York Convention States as discussed above, it is clear that that view is, with respect, erroneous. Contrary to the learned JC's understanding of s. 39(1)(a)(vii) and thereby the operation of article V of the New York Convention and article 36 of Model Law, a refusal of recognition or enforcement is not necessarily dependent on the existence of an application to set aside the arbitration award.

[50] It is precisely where it is proved by the opposing or resisting party, such as the appellant, that the award is yet to become binding, that the recognition or enforcement is refused, stayed or even adjourned. In fact, the award may be recognised or enforced on terms such as giving of security – see article VI of the New York Convention; *Dowans Holdings SA and Another v. Tanzania Electric Supply Co Ltd* (*supra*).

[51] For the same reasons, His Lordship's conclusions about s. 8 and the absence of inherent powers of the court "to order a stay as amplified in cases such as *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 should not be grafted on to matters that legitimately fall within the ambit of the Arbitration Act. Nothing in the Arbitration Act admits of a stay of enforcement predicated upon special circumstances that would normally afford a stay of execution in respect of a judgment of a court", are plainly erroneous.

[52] Where s. 39(1)(a)(vii) is invoked, the court is obliged to examine the basis relied on. Had His Lordship undertaken that exercise, he would have found, as we have, that the terms of s. 39(1)(a)(vii) are met. This is whether the issue is canvassed at the time when the order of recognition and enforcement is sought as was the case here; or whether it is raised after such an order under s. 38 was granted.

[53] In the first scenario, the award, before it was recognised and enforced by the High Court, was in our opinion an award which had yet to become binding. *Albeit* s. 36 which the appellant is not disputing, there are the peculiar facts in these appeals that render the award yet to become binding. The parties had categorically agreed to refer the intrinsically and inextricably related matters of the equipment and the award to arbitration. In fact, the very subject matter in Suit 87 is about the interplay between the award and the equipment. This is quite evident from both the pleaded claim in Suit 87 (see pp. 705 to 719 of the record of appeal) as well as from the notice to arbitrate page that was issued, the latter defining the jurisdiction of the arbitral tribunal that was eventually set up to determine the second arbitration.

[54] In Suit 87, the appellant refers to the respondent's contention that it had carried out the contracted works, that the equipment had been ordered from the various suppliers and/or were completely assembled, built and were ready to be supplied to the appellant under the EPCC contract; and for which it had incurred amongst others, shipping, unloading and storage charges; that it had ownership of the equipment and/or was able to transfer ownership to the appellant in accordance with the terms of the EPCC contract. These matters are relied on as the basis of estoppel.

[55] At paras. 20 to 22 of the statement of claim, the appellant explained that the respondent had, in the first arbitration, claimed the full value of the equipment and was ultimately awarded the sum of RM6,559,440.37 after deducting the amounts already paid as "milestone payments" under the EPCC contract. At paras. 23 to 36, the appellant asserts its claim on the delivery and ownership of the equipment, claiming that the respondent had made untrue assertions and representations about the ownership and availability of and being able to deliver the equipment; that but for these representations, the arbitrators in the first arbitration would not have directed the appellant to make payment to the respondent; that there are these misrepresentations and misstatements are apparent from the respondent's silence and failure to confirm its position on the equipment. For all these complaints, the appellant sought the following reliefs:

i. delivery and/or transfer of ownership of the equipment within 60 days from the payment of the sum under the Award;

ii. that the appellant be at liberty pay the sum under the Award to a stakeholder or otherwise as directed by the Court;

iii. that in the event the respondent is unable to deliver and/or transfer ownership of the equipment, the respondent be directed to pay the appellant the sum of RM8,480,850.00;

iv. that in the event the respondent fails to deliver and/or transfer ownership of the equipment within 60 days from the sum awarded under the Award, then the respondent is to pay the appellant the sum of RM6,672,750.00, which is the sum awarded under the Award.

[56] Agreeing with the respondent and upon consensual terms already pointed out earlier, the learned judge referred this dispute in Suit 87 to arbitration (second arbitration). The notice to arbitrate that was issued following that order of the court reads as follows:

(a) Whether pursuant to the EPCC Contract, Bio-Xcell is entitled to the legal and/or beneficial ownership of the Equipment upon payment of the arbitration sum awarded;

(b) Whether Bio-Xcell's right to the equipment is incidental and consequential to the decision of the learned arbitrators in giving full value to the equipment based upon the final account;

(c) Whether Lebas's right to payment of the arbitration sum awarded co-exists with a reciprocal obligation on the part of Lebas to deliver and/or transfer of ownership of the equipment to Bio-Xcell;

(d) Whether the arbitration award is conditional upon and/or subject to Lebas's ability to deliver and/or transfer ownership of the equipment to Bio-Xcell; and

(e) Whether in the event of Lebas's inability to deliver and/or transfer of ownership of the Equipment to Bio-Xcell, Lebas is estopped and/or precluded from enforcing the Arbitration Award and/is liable to account to Bio-Xcell for monies paid by Bio-Xcell to Lebas in respect of the said Equipment.

[57] From the above, it is our respectful opinion that the learned JC fell into error in holding that though the two disputes (first arbitration and second arbitration) stem from the same EPCC contract, the disputes are nonetheless "discrete and distinct disputes"; and this remains so even if the parties rely on the findings of fact or issues from the first arbitration as the first arbitration concerned payment whilst the second arbitration concerned equipment. The alternative prayer sought was that the enforcement of the final award be suspended pending hearing and disposal of the intended arbitration between the parties as ordered by the High Court on 15 November 2017. The learned JC had rejected the argument of estoppel. In our view, that is a question more properly for determination under the second arbitration. At this point, suffice to say that the issue is not entirely without evidence or merit. There is, at least, some evidence suggesting support for the appellant's contention, especially when the consensual terms to refer the interplay between the award and the equipment to arbitration was made before the learned judge in Suit 87, and it was open to the respondent to reserve its right to invoke s. 38 but it did not.

A **[58]** As is evident from the notice to arbitrate and the cause papers in Suit 87, and similar to the concerns expressed in *Dalimpex Ltd v. Janicki et al; Agros Trading Spolka Z.O.O. v Dalimpex Ltd* (*supra*), it is preferable and makes sense that the issue of the equipment is resolved first by the second arbitration before the award is recognised or enforced; more so when one of the matters
B referred to arbitration is this specific question as to "[W]hether the arbitration award is conditional upon and/or subject to Lebas's ability to deliver and/or transfer ownership of the equipment to Bio-Xcell."

[59] In the face of such a defined dispute between the parties and while it may be true that the appellant is seeking some form of security, the fact
C remains that a case has been made to support the contention that the award is yet to become binding; that the recognition ought to be stayed pending the hearing and disposal of the second arbitration. What should not be overlooked is that it was the respondent who approached the court to refer the appellant's dispute to arbitration and further agreed to certain consensual
D terms which relate the award with the ownership and delivery of the equipment and thereby the first arbitration to the second arbitration; which terms and circumstances were relied on and upon which the parties, especially the appellant had acted. Those consensual terms are binding on the parties (see Federal Court decision in *Tong Lee Hwa v. Chin Ah Kwi* [1971] 1 LNS 143; [1971] 2 MLJ 75), thus there is some basis for the argument of
E estoppel as submitted by the appellant. However, how the award and the ownership of the equipment will finally be determined is precisely one of the questions to be determined in the second arbitration, and for such reason, we agree that the award is not yet binding within the meaning of s. 39(1)(a)(vii).

F **[60]** In the second position where after the order for recognition and enforcement of the award had been granted, the award has now all the hallmarks of an order of the court instead of the arbitral tribunal. As an order of the court, the Courts of Judicature Act 1964, the Rules of Court 2012 and all the related laws will apply; and that will include the rules on stay of any
G order of court. For the purposes of execution and enforcement, the Arbitration Act 2005 will no longer apply to the award or will no longer take centre stage as the award is now to be treated as an order of court. In such a case, the principles as enunciated in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* will apply. Having regard to the circumstances and reasons relied on by the appellant, we are amply satisfied
H that the conditions for a grant of a stay would have been and are made out.

I

Conclusion

[61] We were thus unanimous in finding that there were merits in the appeals. We found for the reasons set out above that the learned JC was plainly wrong and in error in dismissing the appellant's application in encl. 9. We found that the appellant's application ought to have been allowed as the appellant had proven his case under s. 39(1)(a)(vii) of the Arbitration Act 2005.

[62] Consequently, the appeals are allowed with costs. The decisions of the High Court are set aside. We further allow encl. 9 in terms of prayer (1) and that the decision in relation to encl. (1) be adjourned pending disposal of the second arbitration. We further ordered that the sums ordered in the arbitration award be paid to the respondent's solicitors to be held in a stakeholder's account pending the disposal of the second arbitration and that the sums be paid within 14 days from today. We finally gave the parties the liberty to apply.